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NO. 83-1858

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

JAMES M. MURPHY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

RICHARD H. PARSONS
609 Lehmann Bldg.
Peoria, Ill. 61602
309-674-6013

ATTORNEY FOR PETITIONER

63pp

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment, is applicable to state criminal contempt proceedings.

2. If so, were Petitioner's rights against double jeopardy violated where he was adjudged in contempt without a hearing, imprisoned, and once again tried and convicted for the same offenses.

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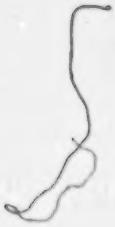

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1983

JAMES M. MURPHY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF TEXAS

Petitioner, James M. Murphy, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the Court of Criminal Appeals of Texas, affirming a judgment of contempt against Petitioner rendered by the 297th Judicial District Court of Tarrant County, Texas. A petition for rehearing was denied on January 18, 1984,

and on January 20, 1984, the Court of Criminal Appeals granted a stay of the mandate for a period of thirty days, or until February 21, 1984.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered December 14, 1983 (Ex Parte James M. Murphy, No. 69,205) appears as Appendix A to this Petition. The motion for rehearing was denied without opinion.

JURISDICTION

The judgment and opinion of the Court of Criminal Appeals of Texas was delivered on December 14, 1983. A timely petition for rehearing was denied on January 18, 1984. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment

Five, which provides "...[n]or shall any person be subject for the same offense to be twice put in jeopardy."

2. United States Constitution, Amendment Fourteen.

STATEMENT OF THE CASE

Petitioner is an attorney licensed to practice law in the State of Texas. He was held to be in and was adjudged guilty of direct contempt of the 297th District Court of Tarrant County, Texas, without hearing for failing to appear at a pre-trial and trial setting regarding a criminal case in which he was counsel for the defendant. Petitioner was arrested and confined in jail pursuant to the finding of guilt by the judge of said court. Pursuant to Texas state law a motion was filed by Petitioner seeking his release on personal recognizance and a hearing before another district judge, which motion was granted. Petitioner was released from custody. Another judge was appointed to conduct a hearing on the judgment

of contempt, which judge cited Petitioner to appear before the court on the identical charges for which Petitioner had been adjudged guilty by the presiding judge of the 297th District Court. Petitioner, prior to the hearing, moved to dismiss the citation on the ground that he had previously been placed in jeopardy for the same offense, which motion was denied.

Petitioner, with leave of court first obtained, filed an original proceeding in the Court of Criminal Appeals of Texas by writ of habeas corpus, contending, among other matters, that his rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution had been violated. The Court of Criminal Appeals, while recognizing that Petitioner's rights of due process were violated, dismissed the double jeopardy claim as not being properly before the court. The court also asserted, by footnote, that Petitioner "should not be heard to complain of a violation of his

Fifth Amendment rights while simultaneously requesting and receiving a second trial pursuant to Art. 1911a, supra." A timely motion for rehearing was denied on January 18, 1984, and the Court of Criminal Appeals stayed the mandate for a period of 30 days, or until February 21, 1984 (inasmuch as the 30 day period of time expired on a weekend followed by a holiday, February 20, 1984), to permit the filing of this petition.

A copy of the "Commitment Order" finding Petitioner guilty of contempt and assessing punishment without a hearing appears as Appendix B to this petition.

The warrant of arrest, and return of the sheriff executing same, appears as Appendix C to this petition.

A copy of the "Notice to Appear and Show Cause" order issued by the appointed judge appears as Exhibit D to this petition.

The "Judgment" entered by the appointed judge once again finding Petitioner guilty of contempt appears as Appendix E to this

petition.

The portion of the record where Petitioner's double jeopardy claim was raised in the first instance appears as Appendix F to this petition.

* * * * * * * * * * *

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

I.

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT IS APPLICABLE TO STATE CRIMINAL CONTEMPT PROCEEDINGS.

In Benton v. Maryland, 395 U.S. 784 (1969), this Court held that the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. The right against double jeopardy, as this Court said in Benton, is clearly fundamental to the American scheme of justice.

The Court of Criminal Appeals of Texas, in its opinion below, assumed arguendo that the provisions of the Double Jeopardy Clause applied to this case, but withheld ruling on the claim because it was not perfected by verified motion under provisions of the Texas Code of Criminal Procedure, Articles

27.05 and 27.06. Further, the court noted that Petitioner should not be heard to claim a double jeopardy violation while requesting and receiving a second trial pursuant to the Texas state statute governing contempts against officers of the court. Art. 1911a, Tex. Rev. Civ. St. Thus, the Court of Criminal Appeals did not dispose of Petitioner's claim on its merits.

In Menna v. New York, 423 U.S. 61 (1975), this Court reversed a holding of the New York Court of Appeals affirming a conviction while declining to address the double jeopardy claim. Menna was held in contempt for failure to testify before a grand jury and was sentenced to a flat 30-day's confinement. He was then indicted for his refusal to answer questions before the grand jury. Menna, after unsuccessfully asserting his Double Jeopardy claim, pleaded guilty. The Court of Appeals of New York affirmed, holding that he had waived his double jeopardy claim by his plea of guilty. This Court remanded

the case to the Court of Appeals for a determination of Menna's double jeopardy claim on the merits, without expressing an opinion of that claim. The Court did note, however, that the state had conceded that Petitioner's double jeopardy claim was a strong one on the merits.

The guarantee against double jeopardy protects against a second prosecution for the same offense after conviction, and it protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969), and cases cited therein. In Pearce, it was noted that it is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice, 395 U.S. at 724. In this case, the contempt power of the judge of the 297th District Court was utilized to hold and find Petitioner guilty of criminal contempt without hearing and thereupon imprison Petitioner without the protections of due process of law, Taylor

v. Hayes, 418 U.S. 488 (1974), which forced Petitioner to resort to his only remedy to contest that power and denial of due process. The proceedings against Petitioner were criminal in nature, Menna v. New York, supra, and thus the provisions of the Double Jeopardy Clause of the Fifth Amendment should be made applicable thereto. See, Taylor v. Hayes, supra, wherein this Court described contempt as a "petty criminal offense" for purposes of the right to trial by jury.

* * * * * * * * * * *

II.

WERE PETITIONER'S RIGHTS AGAINST DOUBLE JEOPARDY VIOLATED WHERE HE WAS ADJUDGED IN CONTEMPT WITHOUT A HEARING, IMPRISONED, AND ONCE AGAIN TRIED AND CONVICTED FOR THE SAME OFFENSES.

(A) Did Jeopardy Attach?"

On August 23, 1983, the judge of the 297th Judicial District Court, without notice and hearing, adjudged Petitioner in direct contempt of court for failing to appear at a pre-trial docket call on August 12, 1983, and trial docket call on August 22, 1983, assessed punishment at 72 hours in the Tarrant County Jail and a fine of $500.00, and issued a warrant for Petitioner's arrest. On August 26, 1983, Petitioner was arrested and confined on such warrant. Petitioner was released on his own recognizance. Petitioner asserts that at the point when he was adjudged guilty of contempt, without notice and opportunity to be heard, jeopardy "attached" for Fifth Amendment purposes.

It is generally held that in a jury trial jeopardy attaches when the jury is empaneled and sworn. Downum v. United States, 372 U.S. 734 (1963); Illinois v. Somerville, 410 U.S. 458 (1973). In a non-jury trial, jeopardy attaches when the court begins to hear evidence. Serfass v. United States, 420 U.S. 377 (1975). In Serfass, the Court reiterated that jeopardy does not attach until a defendant is "put to trial before the trier of facts, whether the trier be a jury or a judge." In this case the trier of fact was the offended judge who found Petitioner guilty of direct contempt, and Petitioner was "put to trial" by the offended judge on facts within the knowledge of such judge, i.e. failure to attend court. Indeed, Petitioner was convicted, sentenced and his punishment commenced by incarceration. When viewed in this light, Petitioner was subjected to the hazards of trial and possible conviction, Green v. United States, 355 U.S. 184 (1957), and was at risk of the ultimate

determination of guilt, Serfass, supra.

In Finch v. United State, 433 U.S. 676 (1977), the District Court dismissed an information after considering stipulated facts. The government sought to appeal the dismissal. The Ninth Circuit allowed the appeal, but this Court held that, under Serfass, jeopardy had attached, rendering the appeal by the government barred by the Double Jeopardy Clause. In this case, the offended judge considered facts within his knowledge, once again Petitioner's failure to appear, and found Petitioner guilty of direct contempt. When Petitioner was arrested and confined pursuant to such determination, certainly his liberty was in jeopardy by reason of the proceedings instituted and conducted by the offended judge.

(B) Was Jeopardy Waived?"

After Petitioner was arrested, he sought to invoke the provisions of Art. 1911a, Tex. Rev. Civ. St., which provides, in relevant part as follows:

> "(c) Provided however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred."

Upon his release from confinement, after the offended judge had already adjudged Petitioner guilty of contempt, Petitioner was cited to appear before the appointed judge to show cause why he should not be once again adjudged guilty of contempt. Prior to such hearing, as noted previously, Petitioner protested the second and successive prosecution on Double Jeopardy grounds and on the ground that the original proceedings were void and/or voidable.

The Court of Criminal Appeals held that Petitioner had effectively "waived" his Fifth Amendment claim by failing to assert same in accordance with the Texas Code of Criminal

Procedure. Art. 27.05 provides, in relevant part, as follows:

> "A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:
>
> ...
>
> (2) resulted in conviction...."

Art. 27.06 provides that all special pleas shall be verified by the affidavit of the defendant.

Petitioner suggests that no waiver is apparent by the above in that the Fifth Amendment Double Jeopardy claim is a matter of federal constitutional consideration, and not a matter of state procedural requirements. See, Menna v. New York, supra, and Blackledge v. Perry, 417 U.S. 21 (1974).

Furthermore, Petitioner's invocation of the provisions of Art. 1911a do not operate as a waiver of his Double Jeopardy claim.

Petitioner was imprisoned pursuant to procedures condemned in Taylor v. Hayes, supra. His only remedy to contest that due process violation was to invoke the provisions of Art. 1911a (habeas would not lie because of the remedies available under Art. 1911a). Thus, Petitioner was afforded only one method of review and was in the "dilemma of making an unfree choice"--incarceration or requesting review under Art. 1911a. See, North Carolina v. Pearce, 395 U.S. at 724.

Nor does the due process infirmity of the offended judge's finding of guilt operate to vitiate Petitioner's Double Jeopardy claim. This assertion is sustained by the reasoning of this Court adopted in Benton v. Maryland, supra, reaffirming the position taken in United States v. Ball, 163 U.S. 662 (1896), wherein the invalidity of an indictment would not serve to obviate a Double Jeopardy claim.

III.

REASONS FOR ALLOWANCE OF THE WRIT

As suggested by Rule 17, Rules of the

Supreme Court, the following reasons are advanced by Petitioner for allowance of the writ:

(A) By holding that Petitioner "waived" his Double Jeopardy claim, the Texas Court of Criminal Appeals has decided a federal constitutional question in a way in conflict with applicable decisions of this Court. Menna v. New York, supra; Rule 17 1.(c).

(B) The question presented the Court, whether the Double Jeopardy Clause of the Fifth Amendment applies to "petty criminal offenses" such as state contempt charges, should be settled by this Court.

(C) The Texas Court of Criminal Appeals has, by dicta, decided a federal constitutional question, when jeopardy attaches, in conflict with applicable decisions of this Court. Benton v. Maryland; North Carolina v. Pearce; Serfass v. United States, supra.

* * * * * * * * * * *

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the writ of certiorari should issue to review the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

RICHARD H. PARSONS
609 Lehmann Bldg.
Peoria, Illinois 61602
309-674-6013

ATTORNEY FOR PETITIONER

PROOF OF SERVICE

I certify that a true copy of the foregoing Petition for Writ of Certiorari was sent by United States Mail, postage prepaid to Mr. David Montague, Assistant District Attorney, 200 W. Belknap, Fort Worth, Texas 76196-0201, and to the Clerk of the Court of Criminal Appeals of Texas, Supreme Court Building, Austin, Texas, via Federal Express, on this 20th day of February, 1984.

RICHARD H. PARSONS

APPENDIX A

OPINION OF THE COURT OF

CRIMINAL APPEALS OF TEXAS

EX PARTE JAMES M. MURPHY

NO. 69, 205

Delivered Dec. 14, 1983

EX PARTE JAMES M. MURPHY

Habeas Corpus Application

NO. 69,205

from TARRANT County

O P I N I O N

This is an application for writ of habeas corpus in which the applicant, an attorney, seeks relief from a judgment holding him in contempt of the 297th Judicial District Court of Tarrant County. Applicant was found guilty of two counts of contempt and his punishment was fixed at a fine of $150.00 for one count and $500.00 and one day in the Tarrant County jail for the other.

In six grounds of error, applicant alleges: the order of commitment, show cause order, and contempt judgment are void because each was issued after a violation of due process; the evidence is insufficient to support the judgemnt of contempt; applicant has been twice put in jeopardy for the same acts; the judgment of contempt is void for imposing multiple punishments. We disagree and affirm

the judgment of the trial court.

Applicant was found by the Honorable Charles Dickens to be in "direct" contempt for failing to attend a pretrial hearing in his court on August 12, 1983, and for failing to appear for the trial on the merits, August 22, 1983. The offended judge assessed punishment at seventy-two hours confinement in jail and a $500.00 fine. Applicant was arrested pursuant to such order but was released on personal recognizance pending determination of his guilt or innocence by a judge other than the offended judge. See V.A.C.S. Art. 1911a, Sec. 2(c). Applicant was subsequently served with the order of commitment issued by the offended judge and a notice to appear and show cause why he should not be held in contempt issued by the judge appointed to preside at the 1911a, Sec. 2(c) hearing. There, he was found guilty of the contemptuous acts alleged in the show cause instrument, but his punishment was reduced to a one day

jail term and a fine of $500.00.

We note at the outset that if applicant is guilty of contempt, it is constructive contempt and not direct contempt, regardless of recitations in the offended judge's order of commitment to the contrary. Ex parte Hill, 122 Tex. 80, 52 S.W.2d 367 (Tex.Cr.App. 1932); Ex parte Supercinski, 561 S.W.2d 482 (Tex.Cr. App. 1977). It is well settled that due process considerations require that one who is accused of constructive contempt will be given "full and complete notification" of the charges against him so as to afford him a fair opportunity to defend against them. See Ex parte Edgerly, 441 S.W.2d 514 (Tex.Sup. 1969).

Applicant contends inadequate notice of charges against him denied him due process of law. While we agree that the offended judge deprived applicant of due process by holding him in constructive contempt with-

out adequate notice of a hearing,[1/] Hill, supra; Ex parte Avila, (____S.W.2d____, No. 69,175, delivered 11/9/83), the subsequent 1911a, 2(c) de novo hearing provided adequate constitutional due process safeguards, thereby curing the prior violation. See Ex parte Avila, supra. The notice to appear and show cause delivered to applicant a full five days prior to the de novo hearing was sufficiently specific to afford complete notice of allegations of contumacious conduct and to allow a fair opportunity to defend against them. See and cf. Ex parte Martin, 656 S.W.2d 443 (Tex.Cr.App. 1982). As such, this negated any harm caused by the failure of the offended judge to extend adequate notice and hearing.

1/ The State, in its brief, readily concedes that the offended judge's holding applicant in constructive contempt without a hearing violates due process.

Applicant next challenges the sufficiency of the evidence. In the instant case, the record reflects Judge Charles Lindsey[2/] heard testimony from the respondent's and applicant's witnesses which, taken collectively, could reasonably be said to have proven applicant guilty of the contemptuous acts alleged. When viewed in the light most favorable to the order, we find the evidence is sufficient to warrant Judge Lindsey's decision.

Applicant urges that the notice to appear and show cause and the judgment rendered thereon are at variance with the proof. Specifically, applicant contends that the proof establishes that the offended judge reset the trial of the case in which applicant failed to appear on two separate occasions. On the first occasion, trial was reset

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2/ Judge Lindsey was ordered to conduct a hearing pursuant to Art. 1911a, 2(c), supra, by Administrative Judge Charles Murray.

on August 22 from 10:00 a.m. to 2:00 p.m., apparently in contemplation that applicant might belatedly appear. At 2:00 p.m. when it was evident that the applicant would not appear, the cause was again reset until August 23 at 9:00 a.m. The notice to appear and judgment cite applicant in contempt for failing to appear at pretrial on August 12 and at trial on the merits on August 22. It is clear from the record that applicant did indeed fail to appear on either August 12 or August 22. Any proof of contempt occurring on August 23 is surplusage. There is no fatal variance between the allegations in the notice to appear and judgment and the proof offered.

Applicant complains his rights under the double jeopardy provisions of the United States and Texas Constitutions were violated. He testified that he was arrested upon voluntarily entering the 297th District Courtroom on August 26, was taken to the Tarrant County

Sheriff's office, and was then granted his motion for release upon his personal recognizance. He further testified that he was ordered back to jail after[3/] such motion was granted, and remained there for three to three and one-half hours. Applicant contends that, because he spent time in jail pursuant to the offended judge's Order he cannot be again placed in jeopardy of his liberty.

Assuming arguendo that the jeopardy provision of the Federal and State Constitutions apply to the instant case, the record reflects that applicant orally moved for dismissal of the proceeding on double jeopardy grounds. However, the record is devoid of a verified written motion filed before the hearing.

3/ It should be noted, however, that the transcript, p. 5 reflects the following: "Hearing held on contempt of court in open court; commitment order signed and entered James M. Murphy released on personal recognizance 'bond' in open court." All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

See Articles 27.05 and 27.06, V.A.C.C.P. The question of double jeopardy is not properly before this Court.[4/] Galloway v. State, 420 S.W.2d 721 (Tex.Cr/App. 1967); Nash v. State, 467 S.W.2d 414 (Tex.Cr.App. 1971).

Applicant finally urges that the judgment of contempt signed by Judge Lindsey is void because it imposes multiple punishments for distinct acts of contempt, whereas the original commitment order provided a single punishment for such multiple acts. This contention is without merit. V.A.C.S., Art. 1911a specifically provides that a judge other than the offended judge shall hold a hearing to determine the guilt or innocence of the accused. The provision has been construed to mean such judge may also readjudicate punishment ass-

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4/ We further note that the applicant should not be heard to complain of a violation of his Fifth Amendment rights while simultaneously requesting and receiving a second trial pursuant to Art. 1911a, supra.

essed by the offended judge. Ex parte Howell, 488 S.W.2d 123 (Tex.Cr.App. 1972), appeal dismissed 414 U.S. 803, 94 S.Ct. 114, rehearing denied 414 U.S. 1052, 94 S.Ct. 588, rehearing denied 424 U.S. 936, 96 S.Ct. 1151. The hearing is to be conducted as if a trial de novo, Avila, supra, and is unencumbered by any prior proceedings or holdings. Additionally, punishment may be assessed for more than one act of contempt in a single hearing where the show cause order specifically alleges each act. Ex parte Genecov, 143 Tex. 476, 186 S.W.2d 225 (Tex.Cr.App. 1945); Ex parte McNemee, 605 S.W.2d 353 (Tex.Civ.App. 1980), overruled on other grounds.

The judgment is affirmed.

CAMPBELL, Judge

Delivered December 14, 1983

En Banc

Odom, J., not participating

EX PARTE JAMES M. MURPHY HABEAS CORPUS APPLICATION

NO. 69,205 FROM TARRANT COUNTY

DISSENTING OPINION

I dissent.

The majority correctly states that Art. 1911a, V.A.C.S., "has been construed to mean [that the second judge] may also readjudicate punishment assessed by the offended judge." It cites Ex parte Howell, 488 S.W.2d 123 (Tex.Cr.App.1973), as authority. However, even though the statement is contained in Ex parte Howell, it is pure dictum because in Ex parte Howell, supra, the first punishment that was assessed was not readjudicated at the second hearing. Thus, the question whether the second judge might readjudicate the punishment the first judge had assessed was not before the Court.

Art, 1911a, supra, does not provide, either expressly or implicitly, for a readjudication of punishment. However, by the

express terms of the statute, the second judge only readjudicates the "guilt or innocence" of the officer of the court who was held in contempt by the first judge.

In this instance, the first judge, after finding applicant guilty of two separate contempts, assessed only one punishment, namely, 72 hours' confinement in the county jail and a $500 fine. By the first judge's order, the punishment assessed did not specify whether the punishment applied to just one or both of the contempts. This does not matter because neither of the contempts has been held to be void. Cf. Ex parte Werner, 496 S.W.2d 121, 122-123 (Tex.Civ.App.-San Antonio1973), no writ.

In this instance, the second judge readjudicated the finding that applicant was guilty of both contempts, and then assessed punishment on one contempt at a fine of $150 and on the other at one day confinement in

the county jail and a $300 fine. This I find the second judge could not do.

By the provisions of Art. 1911a, supra, the second judge was restricted to readjudicating applicant's guilt and, if he found that applicant was guilty of both contempts, could only assess the same punishment the first judge had assessed. He was not permitted to reduce the punishment that the first judge had assessed, namely, 72 hours' confinement in the county jail and a $500 fine. The second judge's assessment of punishment is void. The cause should be remanded to the second judge for him to assess the same punishment that the first judge assessed. Because the majority does not do this, I respectfully dissent.

TEAGUE, Judge

En Banc

Delivered: December 14, 1983

APPENDIX B

"COMMITMENT ORDER"

FINDING PETITIONER GUILTY

DATED AUGUST 26, 1983

NO C-54

EX PARTE	)	IN THE DISTRICT
	)	COURT OF TARRANT
	)	COUNTY, TEXAS
JAMES M. MURPHY	)	297TH DISTRICT
	)	COURT

COMMITMENT ORDER

CAME ON to be heard, on the 22nd day of August, 1983, the case of the State of Texas vs. Alfred Vernell Ray, Cause No. 210-495D, which was called for trial. The said Alfred Vernell Ray, whose Attorney of Record is James M. Murphy, 2405 Cedar Springs, Suite 212, Dallas, Texas, 75201, is in custody in the Tarrant County Jail. His Attorney of Record, James M. Murphy, was notified to appear and did not appear. On August 12th, 1983, at 10:00 a.m., the above styled and numbered cause was called on the Pre-Trial docket and the said James M. Murphy did not appear on that date.

The Court finds that the failure to appear in the 297th District Court of Tarrant County,

Texas by the said James M. Murphy on August 12th, 1983 and August 22nd, 1983, is a direct Contempt of Court, and the Court finds that James M. Murphy is in Contempt of Court and that he is sentenced to 72 hours in the Tarrant County Jail and fined $500.

IT IS THEREFORE THE ORDER, JUDGMENT, AND DECREE of this Court that the Sheriff of Tarrant County, Texas place the said James M. Murphy in the Tarrant County Jail and there to safely keep him for a period of 72 hours and until he discharges the $500 fine which is hereby assessed against the contemptor.

Signed this 26th day of August, 1983.

CHARLES DICKENS, Judge
297th District Court
Tarrant County, Texas

(A CERTIFIED COPY)
(FILED AUG. 26, 1983)

APPENDIX 5

APPENDIX C

WARRANT OF ARREST

DATED AUGUST 23, 1983

The State of Texas

In the 297th District Court _____ of Tarrant County, Texas July Term 1983

To the Sheriff or any Constable of Tarrant, County, Greeting:

WHEREAS, on the 23rd day of August A.D. 1983 a judgment was rendered by the 297th District Court _____ of Tarrant County, Texas, in favor of the State of Texas, against JAMES M. MURPHY for the sum of $500.00 dollars for fine, and 72 hours XXXX in jail, XXXXXXXXXXXXXXXXXXXXXXXX. Total fine and cost $500.00.

THESE ARE THEREFORE, TO COMMAND YOU to take the body of him, the said: JAMES M. MURPHY and deliver him, to the jailor of the said County, at Fort Worth, unless he pays the sum above mentioned, together with all costs incurred in executing this writ and until said sentence is fully satified.

HEREIN FAIL NOT, but make due return of this writ as the law directs.

Given under my hand and seal of office this 23rd day of August A.D. 1983

Offense CONTEMPT OF COURT

Credit -0-

J.W. BOORMAN

Clerk, The 297th District Court of Tarrant County, Texas

BILL OF COST

	Dol.	Cts		Dol.	Cts
Clerk's Fee	15	00	Fine	500	00
Certified Copy	1	00	Amount Clerk's Cost Brought Forward		
Trial Fee	5	00	District Attorney	15	00
Planning Fund	10	00	Sheriff's Fees	10	00
CVCA Fund	10	00	Educational Fund	1	00
Clerk's Cost Carried Forward	-0-		TOTAL FINE AND COSTS	500	00

THE STATE OF TEXAS, §
County of §
Tarrant §

I, J.W. BOORMAN, Clerk of the above The 297th District Court _____ in and for said County and State, hereby certify the above to be a true and correct account of Fines and Costs in above entitled and numbered cause up to this date

WITNESS my hand and seal of said Court this the 23rd day of August, 1983

J.W. BOORMAN
Clerk, The 297th
District Court
of Tarrant County, Texas

By Sandra Holloway
Deputy.

(A CERTIFIED COPY)

NO. C-54

THE 297th DISTRICT COURT

of Tarrant County, Texas

THE STATE OF TEXAS

vs. § CAPIAS PRO FINUM

JAMES M. MURPHY

Time to Serve -72- HOURS

Amount of Fine . . . . . $ 500.00

Amount of Costs . . . . . $ -0-

Total . . . $ 500.00

Credit -0-

issued on the 23rd day

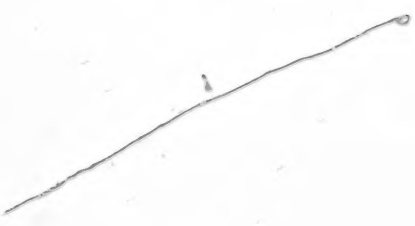
AUGUST A.D. 1983

J.W. BOORMAN

Clerk, The 297th District Court

of Tarrant County, Texas

By Sandra Holloway Deputy.



SHERIFF'S RETURN

Came to hand on the 26th day of August A.D.1983 at 10:45 o'clock A.M. and executed on the 26th day of August A.D. 1983, by placing in Tarrant County jail

Sheriff of Tarrant County, Texas

By W.E. Johnston Deputy

APPENDIX D

"NOTICE TO APPEAR AND SHOW CAUSE"

NO. C-54

EX PARTE: * IN THE DISTRICT
* COURT OF TARRANT
* COUNTY, TEXAS
JAMES M. MURPHY * 297TH JUDICIAL
* DISTRICT

NOTICE TO APPEAR AND SHOW CAUSE

On August 23, 1983, the Honorable CHARLES DICKENS, Judge of this Court, found the Respondent, Attorney JAMES M. MURPHY, in Contempt of Court, entered as Order of Commitment, and issued a warrant for the arrest of said Respondent MURPHY. Punishment for said Contempt was assessed at seventy-two (72) hours in the Tarrant County Jail and a fine of five hundred dollars ($500.00). A copy of the Order of Commitment referred to above is attached hereto and made a part hereof.

As reason for holding the Respondent in Contempt, Judge DICKENS made the following findings of fact:

1. On the 22nd day of August, 1983, Cause No. 210495D, entitled State

of Texas vs. Alfred Vernell Ray, was pending in this Court, having been duly set for trial on that date, was called for trial. Respondent, JAMES M. MURPHY was the attorney of record for Defendant RAY and, although having been notified by the Court to appear for said trial on August 22, 1983, failed and refused to appear.

2. On the 12th day of August, 1983, Cause No. 210495D, entitled, State of Texas vs. Alfred Vernell Ray was pending in this Court and having been duly set for pretrial hearings, was called by the Court. Respondent, JAMES M. MURPHY, the attorney of record for said Defendant RAY, although having been duly notified by the Court to appear for said pretrial hearing, failed and refused to appear.

On August 26, 1983 the Respondent was arrested pursuant to said arrest warrant and on his motion, released on his own personal

recognizance. Also, the said Respondent requested that the presiding Judge of the Administrative Judicial District appoint a Judge of another District Court to make a determination of Respondent's guilt or innocence. Pursuant to said request, the Honorable CHARLES J. MURRAY, presiding Judge of the Eighth Administrative Judicial District, appointed the undersigned District Judge for the purpose of hearing and determining the guilt or innocence of the Respondent herein.

Notice is accordingly given to, JAMES M. MURPHY, Respondent herein, that you are hereby commanded to be and appear in the aforesaid Court in the 297th District Courtroom at the Criminal Courts Building, Fort Worth, Tarrant County, Texas, on the 26th day of September, 1983 at 9:00 o'clock a.m. to then and there show cause if any you have, why you should not be adjudged guilty as alledged and in and punished for Contempt of said Court.

It is, therefore ORDERED that the Clerk of this Court will issue to you the said JAMES M. MURPHY at 2405 Cedar Springs, Suite 212, Dallas, Texas 75201, a copy of this Order requiring you to appear before me in the Courtroom of the 297th Judicial District Court of Tarrant County, Texas, on the 26th day of September, 1983 at 9:00 o'clock a.m. then and there to show cause, if any you have, why you should not be adjudged guilty as alledged and in Contempt of said Court for failure to carry out its Orders to appear.

SIGNED this 1st day of September 1983.

(A CERTIFIED COPY)

(FILED SEP 1,1983)

_____

CHARLES W. LINDSEY

Judge Presiding

APPENDIX E

JUDGMENT OF CONTEMPT

NO. C-54

EX PARTE:	)	IN THE DISTRICT
	)	COURT OF TARRANT
	)	COUNTY, TEXAS
JAMES M. MURPHY	)	297TH DISTRICT
	)	COURT

J U D G M E N T

WHEREAS, on the 26th day of August, 1983, the Honorable Charles Dickens, Judge of this Court, found the Respondent, JAMES M. MURPHY, in contempt for failure to appear at a pretrial hearing on August 22, 1983, each in Cause No. 210495D, entitled State of Texas vs. Alfred Vernell Ray, than pending before this Court; and

WHEREAS, said JAMES M. MURPHY was an officer of the Court; and

WHEREAS, under the provision of Article 1911a, R.C.S. of Texas the said Respondent filed his motion for a determination of his guilt or innocence by a Judge of a District Court other than the offended Court; and

WHEREAS, the undersigned District

Judge being duly assigned to the 213th Judicial District Court of Texas was appointed by the Presiding Judge of the Eighth Administrative Judicial District, the Honorable Charles J. Murray, for the purpose of hearing and determining the guilt or innocence of the Respondent herein; and

WHEREAS, on September 26, 1983, came on to be heard the above entitled and numbered cause and it appears that Respondent was duly cited by scire facias to appear here and show cause why he should now be held in contempt of this Court and that he did appear and answer herein.

And the Court having heard all evidence introduced and abducted by both parties herein is of the opinion and finds that:

On the 12th day of August, 1983, Cause No. 210495D, entitled, State of Texas vs. Alfred Vernell Ray was pending in this Court and having been duly set for pretrial hearings, was called by the Court and Respondent,

JAMES M. MURPHY, the attorney of record for said Defendant RAY, although having been duly notified by the Court to appear for said pre-trial hearing at 10:00 a.m., August 12, 1983, failed and refused to appear at that time or any other time on that date and such failure to appear was calculated to abstruct and impede the administration of justice and to interfere with the orderly expeditious conduct of proceedings before this Court.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that Respondent, JAMES M. MURPHY, is in contempt of this Court for such failure and refusal to appear on August 12, 1983, and it is ordered that a fine of ONE HUNDRED FIFTY AND NO/ 100 DOLLARS ($150.00) and for so doing, this Judgment and Order and shall be sufficient warrant and authority to said Sheriff.

And further the Court having heard all evidence introduced and abducted by both parties herein is of the opinion and finds that on

the 22nd day of August, 1983, Cause No. 210-495D, entitled State of Texas vs. Alfred Vernell Ray, was pending in this Court, having been duly set for trial on that date, was called to trial. Respondent, JAMES M. MURPHY, was the attorney of record for Defendant RAY and, although having been notified by the Court to appear for said trial at 9:00o'-clock a.m. on August 22, 1983, failed and refused to appear at that time on any other time on that date and such failure to appear was calculated to abstruct and impede the administration of justice and to interfere with the orderly expeditious conduct of proceedings before this Court.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that Respondent, JAMES M. MURPHY, is in contempt of this Court for such failure and refusal to appear on August, 22, 1983, and it is ordered that JAMES M. MURPHY is hereby punished for such contempt of this

Court by confinement in the Jail of Tarrant County, Texas, for a period of one (1) day and in addition, a fine of THREE HUNDRED AND NO/100 DOLLARS ($300.00) be assessed against JAMES M. MURPHY as punishment for such contempt, and the Clerk of this Court will issue a Writ commanding the Sheriff of this County to take the said JAMES M. MURPHY into his custody and restrain him in his custody until JAMES M. MURPHY has served the period of confinement herein imposed and until payment of said fine of THREE HUNDRED AND NO/100 DOLLARS ($300.00) and for so doing this Judgment and Order shall be sufficient warrant and authority to said Sheriff.

SIGNED this the 28 day of September, 1983.

_____

JUDGE PRESIDING

APPENDIX F

RECORD EXERPTS

P R O C E E D I N G S

THE COURT: Are you James M. Murphy?

MR. MURPHY: Yes, Your Honor.

THE COURT: The Court has before it at this time, Cause No. C-54, entitled Ex parte: James M. Murphy. I understand that you have been served with a Show Cause Order in this matter, is that right?

MR. MURPHY: That's correct, Your Honor.

THE COURT: Is the State and everybody ready to proceed?

MR. WORLEY: Yes, Your Honor. We are ready.

THE COURT: I don't know who starts first. I guess the State does.

MR. BURNS: By leave of the Court, if I could, I would like to enter an oral Motion at this time.

THE COURT: All right.

MR. BURNS: To Dismiss the Show Cause on the basis that the commitment order is on it's face, void, in that it alleges

a direct contempt and the allegations in the commitment order clearly show that if there was any contempt at all, that it was constructive, and further, we would move to dismiss on the grounds that pursuant to said commitment order, Mr. Murphy was placed in the Tarrant County Jail as the Court can see, in that the warrant was executed and there is a Sheriff's return which is a violation of Article 19.11, and that Mr. Murphy has already been placed in jeopardy pursuant to the allegations in the commitment order, and we would move to dismiss on those grounds.

THE COURT: You may or may not be correct about whether it was direct or indirect, but you saw fit to ask to appeal the matter for a trial before another Judge, and that was granted, and a Show Cause Order has been issued, and you have been given ample time to prepare to go to trial, and we are going to have a hearing. This is a trial De Novo as far as I'm concerned.

MR. BURNS: I do have another problem. I have a witness that's coming over here, and I don't see him here yet.

THE COURT: We'll go ahead and we'll see.

MR. WORLEY: Your Honor, we would call

CORRECTED COPY

Supreme Court, U.S.
FILED
JUL 23 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1858

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES M. MURPHY,
Petitioner
v.
THE STATE OF TEXAS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

L.T. WILSON, Assistant
Criminal District Attorney
Chief of the Criminal Division

C. CHRIS MARSHALL, Assistant
Criminal District Attorney
Chief of the Appellate Section

DAVID K. CHAPMAN, Assistant
Criminal District Attorney
COUNSEL OF RECORD

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Attorneys for Respondent

28pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the holding of the Court of Criminal Appeals is supported by an adequate and independent state ground barring this Court's review of the federal double jeopardy questions raised by petitioner.

2. Whether the Texas system for trying contempt cases against attorneys violates the Double Jeopardy Clause of the Fifth Amendment.

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No. 83-1858

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JAMES M. MURPHY,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the State of Texas, respectfully requests that the Court deny the petition for writ of certiorari, which seeks review of the opinion of the Texas Court of Criminal Appeals in Ex parte Murphy, reported at 669 S.W.2d 320. The Court's mandate in that case was issued June 14, 1984.

STATUTORY PROVISIONS INVOLVED

1. Texas Code of Criminal Procedure Annotated, Article 27.05 (Vernon Supp. 1984):

A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:

(1) resulted in acquittal;

(2) resulted in conviction;

(3) was improperly terminated; or

(4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

2. Texas Code of Criminal Procedure Annotated, Article 27.06 (Vernon Supp. 1984):

Every special plea shall be verified by the affidavit of the defendant.

3. Texas Revised Civil Statutes Annotated, Article 1911a, Section 2(c)(Vernon Supp. 1984):

Provided, however, an officer of a court held in contempt by a trial court shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred.

STATEMENT OF THE CASE

Petitioner was attorney of record for Alfred Ray, the defendant in a felony case scheduled for

a pre-trial hearing on August 12, 1983, in the 297th District Court of Tarrant County, Texas. Petitioner failed to appear at that hearing and likewise failed to appear at the trial setting scheduled in the same court ten days later, on August 22nd. As a consequence of these failures to appear, the court found petitioner in contempt of court the next day, assessed his punishment at 72 hours in jail and a $500.00 fine, and issued a warrant for his arrest.

Three days later petitioner was arrested pursuant to the warrant. However, in accord with Tex. Rev. Civ. Stat. Ann. art. 1911a, § 2(c) (Vernon Supp. 1984), he promptly filed a motion asking that he be released on his personal recognizance and requesting that a judge other than the offended judge be appointed to determine his guilt or innocence. Petitioner's motion was granted, the Honorable Charles W. Lindsey was appointed to hear his case, and petitioner was given timely notice of the date and purpose of the hearing.

Petitioner appeared and presented evidence at the hearing, but at no time did he file a special jeopardy plea supported by affidavit, as required by Tex. Code Crim. Proc. Ann. arts. 27.05, 27.06 (Vernon Supp. 1984). At the conclusion of the hearing he was found guilty of two counts of contempt by Judge Lindsey, who sentenced him to a fine of $150.00 on the first count and a fine of $300.00, plus one day of confinement, on the second count.

In an original writ of habeas corpus in the Texas Court of Criminal Appeals petitioner contended that double jeopardy principles provided a barrier to Judge Lindsey's findings. It is that court's denial of relief which petitioner now asks this Court to review.

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAIVED HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE BY FAILING TO COMPLY WITH THE STATE STATUTORY REQUIREMENT THAT THOSE RIGHTS BE URGED PRIOR TO TRIAL IN A WRITTEN MOTION SUPPORTED BY AN AFFIDAVIT.

Like other valuable constitutional rights, the bar of double jeopardy may be waived. Jeffers v. United States, 432 U.S. 137, 150-154 (1977). It follows that a state may require a defendant to plead and prove his jeopardy defense in a strictly prescribed manner or else forfeit his right to assert it at a later time. See Jeffers, supra, 432 U.S., at 152; Williams v. Florida, 399 U.S. 78, 81 (1970)(defendant may be required to give the state pre-trial notice of alibi defense and supporting witnesses; failure to do so waives his right to present testimony from those witnesses).

Accordingly, numerous jurisdictions have held that their statutory or quasi-statutory requirements for pleading and proving a double jeopardy defense are to be strictly enforced, and the failure to comply with those requirements operates as a waiver of the right to complain of a double jeopardy violation. See, e.g., United States v. Perez, 565 F.2d 1227, 1232 (2d Cir. 1977); Drakes v. State, 400 So.2d 487 (Fla. App. 1980); Carbonneau v. Warden of Nevada State Prison, 634 P.2d 1197 (Nev. 1981); People v. Fairchild, 52 Cal. App. 2d 831, 62 Cal. Rptr. 535 (1967), cert. denied, 391 U.S. 955 (1968); Anthony v. State, 273 So.2d 222 (Ala. Crim. App. 1972), writ denied, 273 So.2d 227, followed in Steward v. State, 314 So.2d 313 (Ala. Crim. App. 1975), writ denied, 314 So.2d 317. Cf. People v. Michael, 48 N.Y.2d 1, 394 N.E.2d 1134 (1979).

In Texas the bar of double jeopardy must be urged prior to trial by a verified written plead-

ing. Tex. Code Crim. Proc. Ann. art. 27.05, 27.06, supra. If a criminal defendant fails to file such a pleading, he waives his right to raise constitutional double jeopardy claims on appeal. Dedmon v. State, 478 S.W.2d 486, 489 (Tex. Crim. App. 1972); Shaffer v. State, 477 S.W.2d 873, 875 (Tex. Crim. App. 1972). The court below relied upon these statutory procedures in overruling petitioner's double jeopardy contentions. Respondent contends that it was constitutionally authorized to do so.

This Court has "recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring [its] review of a federal question." Hathorn v. Lovorn, 457 U.S. 255, 262 (1982). However, the state procedural rule must be "'strictly or regularly followed'" in order to be adequate. Id., at 263, quoting from Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

Except in one narrowly-defined situation, the Texas Court of Criminal Appeals has strictly followed the statutory requirements of Articles 27.05 and 27.06 of the Texas Code of Criminal Procedure. The Court declines to apply these statutes only when the alleged prior conviction or acquittal was before the same judge in the same trial court as the subsequent trial. E.g., Black v. State, 143 Tex. Crim. 318, 320, 158 S.W.2d 795, 796 (1942); Duckett v. State, 454 S.W.2d 755, 758, n.2 (Tex. Crim. App. 1970);[1] Ex parte Scelles, 511 S.W. 2d 300, 301 (Tex. Crim. App. 1974); Ex parte Jewell, 535 S.W.2d 362, 365 (Tex. Crim. App. 1976). Otherwise, the statutes are strictly enforced. E.g., Dedmon v. State, supra; Shaffer v. State, supra; Ex parte Murphy, supra. Thus the state procedural rules upon which the lower court

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[1] The pertinent holding of Duckett is clarified in Ex parte Scelles, infra, 511 S.W.2d at 301, n. 3.

relied are applied "evenhandedly to all similar claims"; they are not enforced "only irregularly". Hathorn, supra, 457 U.S., at 263, 264-265. It follows that the Texas court properly overruled petitioner's double jeopardy contentions because of his noncompliance with a Texas procedural rule. That court's action therefore constitutes an independent and adequate state ground barring this Court's review of the petitioner's double jeopardy claim. Hathorn, supra, 457 U.S., at 262.

II.

THE TWO-STAGE TEXAS SCHEME FOR DETERMINING WHETHER ATTORNEYS ARE IN CONTEMPT OF COURT DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

It is clear that the order holding petitioner in contempt was not remedial or coercive but punitive; hence, the contempt was criminal rather than civil. Cheff v. Schnackenberg, 384 U.S. 373, 377 (1966); Shillitani v. United States, 384 U.S. 364, 368-369 (1966). And it appears that the pro-

visions of the Double Jeopardy Clause apply to criminal contempt actions as they do to other criminal cases. See Colombo v. New York, 405 U.S. 9, 11 (1972); Menna v. New York, 423 U.S. 61, 62, n.1 (1975). However, the double jeopardy barriers of the Constitution do not govern petitioner's case, for, as this Court's holdings make evident, he was placed in jeopardy only once.

Petitioner's double jeopardy contention is controlled by this Court's holding in Justices of Boston Municipal Court v. Lydon, 104 S.Ct. 1805 (1984). In Lydon, the defendant was arrested for breaking into an automobile, then convicted in a bench trial before a Boston municipal judge. He sought a de novo jury trial in accord with Massachusetts law and was released on a personal recognizance bond pending trial. Before that second trial he moved to dismiss the charge, contending that no evidence of intent had been introduced at his first trial, and that retrial was accordingly barred by the holdings of Burks v.

United States, 437 U.S. 1 (1978). Lydon, supra, 104 S.Ct., at 1818. In rejecting Lydon's contention, the Court held that the bar of the Double Jeopardy Clause does not apply unless jeopardy has both attached and terminated. Id., at 1813-1814. And it agreed that Lydon's "'second stage proceeding can be regarded as but an enlarged, fact- sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more -- rather than less -- of the process normally extended to criminal defendants in this nation.'" Id., at 1814, quoting from Lydon v. Justices of Boston Municipal Court, 598 F.2d 1, 12 (1st Cir. 1982)(Campbell, J., dissenting). The Court concluded that neither Lydon's initial conviction in his bench trial nor any other aspect of the proceedings caused jeopardy to terminate; hence, his trial de novo was not barred.

Petitioner was convicted and sentenced in accord with the procedures established by Tex. Rev.

Civ. Stat. Ann. art. 1911a, § 2(c), supra. See Manness v. Meyers, 419 U.S. 449, 456 (1975). That statute provides that when an officer of the court is held in contempt, he may file a motion requesting release upon his personal recognizance and a determination of his guilt or innocence by a judge other than the offended magistrate. That second judge also has the power to alter the sentence originally imposed on the contemnor by the offended judge. See, e.g., Manness, supra, 419 U.S., at 457; Ex parte Curtis, 568 S.W.2d 363, 365 (Tex. Crim. App. 1978).

Thus, when an officer of a Texas court invokes the permissive provisions of Section 2(c), he is in virtually the same position as a defendant who elects a bench trial in the "two-tier" system used in the municipal courts of Boston. Lydon, supra, 104 S.Ct. at 1807-1808. Like the Boston defendant, if the Texas attorney is dissatisfied with the initial judgment and sentence im-

posed upon him, he is absolutely entitled to a trial de novo before a different fact-finder.

There is only one significant difference between the Texas contemnor and the Boston defendant, but it is irrelevant to the double jeopardy issues petitioner raises. This petitioner had no right to a jury, while the defendant in Lydon had such a right, which he could waive. Id., at 1808, n.2. But because petitioner's maximum possible sentence was six months in jail (plus a fine), he was properly deprived of a jury trial by the Texas statute. Art. 1911a, supra, § 2(a); Cheff v. Schnackenberg, supra. Also, it is well established that the Double Jeopardy Clause impinges on both jury trials and those before the court. United States v. Jorn, 400 U.S. 470, 479 (1971); Serfass v. United States, 420 U.S. 377, 388 (1975). Therefore, the distinction between the Boston municipal court scheme and these Texas contempt procedures is of no significance for double jeopardy purposes.

Like the criminal defendants in Boston's municipal courts, this petitoner has been given a second opportunity to have his guilt and punishment determined by an independent fact-finder. He has taken advantage of that opportunity and thereby received "more -- rather than less -- of the process normally extended to criminal defendants in this nation." Lydon, supra, 104 S.Ct., at 1814.

III.

THE TWO-STAGE TEXAS SCHEME PROVIDES ESSENTIAL DUE PROCESS SUPPORT FOR THE CONSTITUTIONAL NECESSITY OF A VIGOROUS INDEPENDENT BAR IN OUR SYSTEM OF JUSTICE.

The extra procedural protection Texas gives to contemnors who are officers of the court can have but one purpose: to assure the "vigorous, independent bar... indispensable [to] our system of justice." In re McConnell, 370 U.S. 230, 236

(1962), quoted with approval in Curtis, supra, 568 S.W.2d, at 366. Accord, Taylor v. Hayes, 418 U.S. 488 (1974); Ex parte Martin, 656 S.W.2d 443 (Tex. Crim. App. 1982).

In Taylor, this Court held that in some cases due process required that an attorney-contemnor be tried before a second judge. To its credit, the State of Texas has assured that it is always the attorney himself who decides whether the ultimate fact-finder is the offended judge or another magistrate. But if this petitioner's double jeopardy contention is sustained, the respondent will be required to alter this commendable practice that conforms so well to the requirements of due process: It will be Texas rather than petitioner that is forced to the Hobson's choice between two constitutional protections. See Ullman v. United States, 350 U.S. 425, 428 (1956)("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.").

IV.

THE PETITIONER'S DOUBLE JEOPARDY CONTENTION DOES NOT PRESENT A SUFFICIENTLY IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In Yates v. United States, 355 U.S. 66, 75 (1957), the Court held that it was within a trial court's power to find a criminal contemnor guilty on one day and postpone imposition of sentence to a later day. The Court held that it was likewise permissible for the trial court to "first apply coercive [i.e., civil contempt] remedies in an effort to persuade a party to obey its orders, and only make use of the more drastic criminal sanctions when the disobedience continues." Id., at 75. Surely, the distinction between those procedures and the procedures followed in petitioner's case is "entirely formal." Id.

And in Ex parte Howell, 488 S.W.2d 123 (Tex. Crim. App. 1972), the contemnor-attorney was found

guilty of contempt under Art. 1911a, supra, and, the trial judge followed the procedures which petitioner now challenges. In his habeas corpus petition before the Texas Court of Criminal Appeals, Howell argued that the statutory scheme violated his right to due process of law and equal protection of the laws because it "provide[d] for punishment prior to a determination of guilt or innocence." Howell, supra, 488 S.W.2d, at 127. The Texas Court rejected this contention. Id. Howell's appeal to this Court was dismissed for want of a substantial federal question. Howell v. Jones, 414 U.S. 803 (1973). Of course, this was a decision of the merits of the case. Hicks v. Miranda, 422 U.S. 332, 343-345 (1975); Howell v. Jones, 516 F.2d 53 (5th Cir. 1975), cert. denied, 424 U.S. 916 (1976).

Respondent contends that the double jeopardy contention of this petitioner is as insubstantial as the due process and equal protection claims of

Howell. See Howell v. Jones, supra, 516 F.2d at 57.

CONCLUSION

By his failure to comply with a valid state statute, petitioner has waived his right to complain of any violation of his rights under the Double Jeopardy Clause. A comparable double jeopardy claim has recently been decided by this Court, and it is contrary to his contentions. The statutory scheme which is the true object of his complaint is a valuable protector of the due process rights of attorneys and their clients. And the double jeopardy questions he raises are so insubstantial as to be unworthy of this Court's discretionary jurisdiction. For these reasons, respondent asks that the writ of certiorari not issue to review the decision of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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